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No. 90-107

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY and KAY STEWART - - - - - - - - Petitioners

versus

F.T.P., the Real Party in Interest, and HONORABLE ROBERT E. DELAHANTY, Jefferson District Court Judge - - Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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QUESTION PRESENTED FOR REVIEW

Does the First Amendment to the United States Constitution prohibit the mandatory closure of juvenile court delinquency hearings and records, which relate to a constitutional challenge to a state statute, where the closure occurs without any consideration of the interests allegedly advanced by closure or the availability of more narrowly tailored alternatives to closure?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
THE REASONS FOR GRANTING THE WRIT	10
Kentucky Revised Statutes 610.070(3) and 610.340(1), as Construed by the Kentucky Court of Appeals, Violate the First Amendment to the Constitution of the United States as Applied to the States Through the Fourteenth Amendment	10
A. The First Amendment Right to Attend Judicial Proceedings Requires that Such Proceedings Be Open in Their Entirety Unless Closure, in Whole or in Part, Represents the Least Drastic Means of Achieving an Overriding Governmental Interest	10
B. The Interests Identified By the Kentucky Courts are Insufficient to Require Closure of All Hearings and Records in Juvenile Court	24
CONCLUSION	29
APPENDIX:	
Opinion of the Court of Appeals of Kentucky, October 27, 1989	1a
Order of the Supreme Court of Kentucky, April 18, 1990	8a
Opinion of the Supreme Court of Kentucky in *F.T.P., an Unnamed Child v. Courier-Journal and Louisville Times Company*, 774 S.W.2d 444 (Ky. 1989).	9a

TABLE OF AUTHORITIES

Cases: PAGE

Associated Press v. Bradshaw, 410 N.W.2d 577 (S.D. 1987) 22, 23

Branzburg v. Hayes, 408 U.S. 665 (1972) 12

Davis v. Alaska, 415 U.S. 308 (1974) 25, 26

Duncan v. Louisiana, 391 U.S. 145 (1968) 17

Edward A. Sherman Publishing Co. v. Goldberg, 443 A.2d 1252 (R.I. 1982) 23

Florida Publishing Company v. Morgan, 253 Ga. 467, 322 S.E.2d 233 (Ga. 1984) 23

Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (Blackmun, J., dissenting) 13

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 10, 13, 14, 26, 27, 28

In re Gault, 387 U.S. 1 (1967) 16, 21, 29

In re J.S., 140 Vt. 458, 438 A.2d 1125 (1981) 23

Kent v. United States, 383 U.S. 541 (1966) 18

Matter of N.H.B., 769 P.2d 844 (Utah App. 1989) 23

Ohio ex rel Dispatch Printing Co. v. Petree, 15 Med. L. Rptr. 2200 (Ohio App. 1988) 23

Orange County Publications v. Dallow, 14 Med. L. Rptr. 1311 (N.Y. Sup. Ct. 1987) 21

Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) 10, 14, 25

Press Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) 10, 14, 15, 17

RLR v. State of Alaska, 487 P.2d 27 (1971) 19

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 10, 11, 12, 17, 18, 20, 21, 25

State ex rel Oregonian Publishing Company v. Deiz, 289 Or. 277, 613 P.2d 23 (1980) 16

Taylor v. Indiana, 438 N.E.2d 275 (Ind. 1982), *cert. denied*, 459 U.S. 1149 (1983) 23

Constitutional Provisions:

United States Constitution, Amend. 1 ..... passim
United States Constitution, Amend. 14 ..... 2, 10

Statutes:

Chapter 64, *Laws of Kentucky* (1906) 16
Fla. Stat. Ann. §39.09 16
Ky. Rev. Stat. 610.010(a) 4
Ky. Rev. Stat. 610.070(3) and 610.340(1) ..... passim

Other Authorities:

Jonas, *Press Access to the Juvenile Courtroom: Juvenile Anonymity and the First Amendment*, 17 Colum. J.L. & Soc. Probs. 287 (1982) 16
Mack, *The Juvenile Court*, *23* Harv. L. Rev. 104 (1909) .15, 16
Note, *The Public Right of Access to Juvenile Delinquency Hearings*, 81 Mich. L. Rev. 1540 (1983) 16, 20, 21
Richard, D. and S. Bing, *Fairness is a Kid's Game: Children, Public Policy and Child Advocacy in the United States* 59 (1989) 20
Schwartz, I., *(In) Justice for Juveniles: Rethinking the Best Interest of the Child* 161 (1989) 19

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioners, Courier-Journal and Louisville Times Company[1] and Kay Stewart, pray that a writ of certiorari issue to review the decision and order of the Court of Appeals of Kentucky.

OPINIONS BELOW

The opinion and order of the Court of Appeals of Kentucky was not reported but is printed in the Ap-

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[1]In compliance with Supreme Court Rule 29.1, Petitioners state that Gannett Co., Inc. is the parent company of Petitioner, Courier-Journal and Louisville Times Company, which has no subsidiary companies. In compliance with Supreme Court Rule 14.1(b), Petitioners state that there are no parties other than those stated in the caption.

pendix at 1a. The order of the Supreme Court of Kentucky denying discretionary review was not reported but is printed in the Appendix at 8a. An opinion of the Supreme Court of Kentucky in a related case, *F.T.P., an Unnamed Child v. Courier-Journal and Louisville Times Company,* upon which the Court of Appeals relied in the decision sought to be reviewed, was reported at 774 S.W.2d 444 and is printed in the Appendix at 9a.

JURISDICTION

The decision sought to be reviewed was issued by the Court of Appeals of Kentucky on October 27, 1989. On April 18, 1990, the Supreme Court of Kentucky entered an order denying discretionary review of the Court of Appeals decision. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment 14, Section 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

> deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Revised Statutes 610.070(3):

> The general public shall be excluded and only the immediate families or guardians of the parties before the court, witnesses necessary for the prosecution and defense of the case, the probation worker with direct interest in the case, such persons admitted as the judge shall find have a direct interest in the case or in the work of the court, and such other persons as agreed to by the child and his attorney may be admitted to the hearing. Witnesses shall be admitted to the hearing only for the duration of their testimony.

Kentucky Revised Statutes 610.340(1):

> Unless a specific provision of KRS Chapters 600 to 645 specifies otherwise, all juvenile court records of any nature generated pursuant to KRS Chapters 600 to 645 by any agency or instrumentality, public or private, shall be deemed to be confidential and shall not be disclosed except to the child or parent unless ordered by the court for good cause.

STATEMENT OF THE CASE

This action poses the question of whether legal arguments regarding the constitutionality of a Kentucky statute may be conducted in a secret court proceeding, closed to the press and public, without any consideration of the need for closure or reasonable alternatives to it. The arguments were made in a juvenile

court in Jefferson County, Kentucky, in a case in which the Commonwealth of Kentucky alleged that a 16-year-old, F.T.P., while under the custody, care and control of the State, bludgeoned to death another juvenile who resided in the same State-run facility as F.T.P.

Kentucky's juvenile courts have exclusive jurisdiction in proceedings against individuals charged with public offenses (felony, misdemeanor or violation), who are under the age of 18 when the offense is committed. Ky. Rev. Stat. 610.010 (a). After F.T.P. was charged, the Commonwealth moved the juvenile court to transfer the charges against him to circuit court in order to try F.T.P. as an adult, pursuant to the transfer statute then in effect in Kentucky, Ky. Rev. Stat. 640.010. In response to that motion, F.T.P. moved to declare the transfer statute unconstitutional, presumably pursuant to this Court's decision in *Kent v. United States*, 383 U.S. 541 (1966), and its progeny.

The case received widespread publicity. At a hearing in juvenile court on January 4, 1988, counsel for F.T.P. conceded that his client's identity had been revealed in press reports about the incident.

> There has already been both [sic] pictures of my client that have been shown on the news. There's already been release of my client's mother's name and, therefore, the connection from that would be to get the child's name.

At the January 4, 1988 hearing, after oral arguments were held on the motion to declare the transfer statute unconstitutional but before the juvenile court ruled

on it, Petitioners, Courier-Journal and Louisville Times Company and Kay Stewart, a staff writer for the newspaper published by the corporation (hereinafter collectively referred to as "The Courier-Journal"), moved the juvenile court for access to the tapes or transcripts of all arguments, unrelated to the facts of the juvenile case, concerning the motion.

On January 22, 1988, the juvenile court declared the transfer statute unconstitutional. On the same day, the juvenile court denied The Courier-Journal's motion for access to the tapes or transcripts of the arguments on the motion. Although the juvenile court entered an opinion outlining its reasons for denying related motions made by The Courier-Journal[2], the opinion made no mention of the motion for access to the tapes or transcripts of the oral arguments, and no reason for denying the motion was given.

On March 31, 1988, The Courier-Journal filed a petition for declaratory and injunctive relief in the nature of prohibition or mandamus in circuit court, the court which has immediate appellate jurisdiction over the juvenile court. The petition sought access to the tapes or transcripts of the arguments on the con-

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[2]The juvenile court had ordered a State agency to deny The Courier-Journal access to the agency's investigative report on the death at the State-run group home, and refused to rescind the order when moved to do so by The Courier-Journal. A circuit court ordered the report released, after The Courier-Journal sought a writ of prohibition against the juvenile court judge. The juvenile court also denied access to the tapes or transcripts of a proceeding in which a prosecutor and F.T.P.'s mother were held in contempt of court for discussing the charges against F.T.P. The circuit court also found that decision to be in error, and ordered the transcript released to the press and public.

stitutionality of the transfer statute, along with access to other documents and proceedings. After F.T.P. indicated that he would argue the denial of access to the arguments was required by Ky. Rev. Stat. 610.070(3) and 610.340(1), The Courier-Journal served the Attorney General of Kentucky with copies of The Courier-Journal's petition and F.T.P.'s answer and memorandum.[3] The notice delivered to the Attorney General advised that, to the extent that Ky. Rev. Stat. 610.070(3) and 610.340(1) require the exclusion of the press and public from legal arguments relating to the constitutionality of a Kentucky statute, those sections of the juvenile code are invalid as violative of the United States and Kentucky Constitutions.

On June 15, 1988, the circuit court entered findings of fact, conclusions of law and an order refusing to issue a writ under which The Courier-Journal would have access to the tapes or transcripts of the legal arguments on the constitutionality of the transfer statute. Both The Courier-Journal and F.T.P. appealed portions of the circuit court order to the Court of Appeals of Kentucky.

Meanwhile, the juvenile court's order holding the transfer statute unconstitutional was appealed to the circuit court by the Commonwealth. When The Courier-Journal was denied access to the record and hear-

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[3]A Kentucky statute, Ky. Rev. Stat. 418.075, and a Kentucky Rule of Civil Procedure, CR 24.03, require notice to the Attorney General when the constitutionality of a statute is being challenged. The Courier-Journal raised its constitutional challenge and notified the Attorney General at the earliest possible date.

ings in the circuit court appeal, The Courier-Journal filed an original action in the Court of Appeals of Kentucky, seeking a writ prohibiting the closure of the circuit court proceedings. The Courier-Journal did not challenge the constitutionality of the juvenile court closure statutes in that original action, because it believed that those statutes, by their very terms, did not apply to circuit court appeals of juvenile court decisions.

On February 3, 1989, the Court of Appeals of Kentucky issued a writ, prohibiting the circuit court from excluding The Courier-Journal from hearings in the circuit court appeal and from closing the circuit court record, with the exception of any portions of the juvenile court record contained therein. F.T.P. and The Courier-Journal took an appeal and cross-appeal, respectively, to the Supreme Court of Kentucky.

On June 8, 1989, the Supreme Court of Kentucky held that the entire circuit court record, and all future proceedings in the case, would be closed to the press and public. The Court relied on the closure statutes, Ky. Rev. Stat. 610.070(3) and 610.340(1), and specifically noted that the constitutionality of those statutes was not an issue before the Court. *F.T.P. v. Courier-Journal and Louisville Times Company,* 774 S.W.2d 444, 446 (1989) (Appendix at 11a). Because The Courier-Journal believed that Ky. Rev. Stat. 610.070(3) and 610.340(1) were not related to the issue of closure of circuit court proceedings, it "did not

challenge the constitutionality of the closure statutes," and the constitutionality of those statutes was neither briefed nor argued to the Kentucky Supreme Court. 774 S.W.2d at 446 (Appendix at 11a). Nevertheless, that Court stated that the closure of the proceedings involving F.T.P. "does not violate or do violence to either the federal or the state constitution." 774 S.W.2d at 446 (Appendix at 13a). On September 7, 1989, the Supreme Court of Kentucky denied The Courier-Journal's petition for rehearing.

While the case involving access to the circuit court proceedings, in which the constitutionality of the closure statutes was not an issue, was proceeding in the Supreme Court of Kentucky on an advanced schedule, the case involving access to the tapes or transcripts of the juvenile court arguments, in which the constitutionality of the closure statutes was squarely at issue, was proceeding on a regular schedule in the Kentucky Court of Appeals. On September 12, 1989, the Court of Appeals heard oral argument in the case now sought to be reviewed. At the oral argument, the Court of Appeals was informed of the Kentucky Supreme Court's opinion in *F.T.P. v. Courier-Journal, supra,* which became final five days earlier.

On October 27, 1989, the Court of Appeals of Kentucky affirmed the decision denying The Courier-Journal access to the juvenile court arguments on the constitutionality of the transfer statute, with two of the three members of the panel reluctantly concluding that

the Kentucky Supreme Court's decision in *F.T.P. v. Courier-Journal, supra,* was controlling. *Courier-Journal and Louisville Times Company v. F.T.P.,* Court of Appeals Nos. 88-CA-1489-MR and 88-CA-1490-MR (October 27, 1989) (Appendix at 1a). The Court of Appeals majority opinion noted that the constitutionality of the closure statutes was not before the Kentucky Supreme Court in *F.T.P. v. Courier-Journal.* Moreover, the majority called some of the constitutional arguments raised by The Courier-Journal "quite persuasive" and urged the Supreme Court of Kentucky to consider them on discretionary review.

> We would urge the Supreme Court to grant a petition for review, if one is requested in this case, and to consider the constitutional questions with the benefit of briefs and arguments. We also point the Supreme Court's attention to the reasoning in the dissent filed herein by Judge Hayes.

Appendix at 3a. Judge Hayes' dissent, which the majority urged the Kentucky Supreme Court to consider, unequivocally concluded that the closure statutes are unconstitutional, if they are interpreted as mandatory bars to juvenile court access (Appendix at 5a). Judge Hayes cited two decisions by this Court (Appendix at 4a-5a).

The Courier-Journal moved the Supreme Court of Kentucky to review the Court of Appeals decision. On April 18, 1990, the Kentucky Supreme Court denied discretionary review, and ordered that the Court of Appeals decision not be published (Appendix at 8a). The Courier-Journal now seeks a writ of certiorari to review the decision of the Kentucky Court of Appeals.

THE REASONS FOR GRANTING THE WRIT

KENTUCKY REVISED STATUTES 610.070(3) AND 610.340(1), AS CONSTRUED BY THE KENTUCKY COURT OF APPEALS, VIOLATE THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

A. The First Amendment Right to Attend Judicial Proceedings Requires that Such Proceedings Be Open in Their Entirety Unless Closure, in Whole or in Part, Represents the Least Drastic Means of Achieving an Overriding Governmental Interest.

The question presented by this petition requires the attention of this Court in order to ensure that rights guaranteed by the First and Fourteenth Amendments to the United States Constitution are not compromised by failure to comply with the principles of law this Court announced in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982), *Press Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984) (*"Press Enterprise I"*), and *Press Enterprise Co. v. Superior Court,* 478 U.S. 1 (1986) (*"Press Enterprise II"*), and their progeny. Kentucky's juvenile court closure statutes have been interpreted by the Kentucky courts to require a "shroud of secrecy and confidentiality" — i.e., the *mandatory* closure of all juvenile court hearings and records. *F.T.P. v. Courier-Journal, supra,* 774 S.W.2d at 446 (Appendix at 12a). Under the case sought to be reviewed, juvenile courts in Kentucky are not required, or even allowed, to consider closure on a case-by-case basis, inquiring into the existence

and intensity of interests supporting closure, and considering alternatives less burdensome on First Amendment rights than closure itself. Instead, "the shroud of secrecy and confidentiality [is] mandated by the above-cited statutes. . . ." *Id.* The Kentucky Court of Appeals decision is thus contrary to decisions of this Court and other state and federal courts.

This Court's decision in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), made explicit for the first time that the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, embodies a right on the part of the press and the general public to attend judicial proceedings. *Richmond Newspapers* involved the fourth trial of a criminal defendant on murder charges stemming from the 1975 stabbing death of a hotel manager. Before the trial began, counsel for the defendant moved that it be closed to the public. The prosecution did not object and the trial judge, exercising the discretion he thought was conferred upon him by a Virginia statute, ordered the courtroom closed to all parties except witnesses during the course of their testimony. Richmond Newspapers moved to vacate the closure order and that motion was denied in a closed hearing. The trial of the criminal case proceeded in a closed courtroom until the trial judge entered a finding of "not guilty" at the conclusion of the prosecution's case. Thereafter, the newspaper filed petitions for writs of mandamus and prohibition and

an appeal from the trial court's closure order, all of which were denied by the Virginia Supreme Court. The newspaper then filed an appeal with this Court.

In what was described by Justice Stevens as a "watershed case," 448 U.S. at 582 (Stevens, J., concurring), this Court reversed the judgment of the Virginia Supreme Court. Although no single opinion was adopted by a majority of the Court, the basic theme to which all but one of the members of this Court subscribed was that

> the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated."

Richmond Newspapers, supra, 448 U.S. at 580 (plurality opinion), *quoting, Branzburg v. Hayes,* 408 U.S. 665, 681 (1972).

To be sure, none of the opinions rendered in *Richmond Newspapers* stated that the First Amendment right of access was absolute. The plurality opinion did indicate, however, that the standard for closure should be very high, and that the decision to close trials should be made by the trial judge on a case-by-case basis. Thus, as the plurality opinion put it, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." *Richmond Newspapers, supra,* 448 U.S. at 581. Several of the concurring opinions also cited the very limited circumstances under which closure was

appropriate. Justice Stewart, for example, suggested that a court could order closure only when, and to the degree, necessary to maintain order in the courtroom, "[j]ust as a legislature may impose reasonable, time, place and manner restrictions upon the exercise of First Amendment freedoms." Id. at 600. Justice Blackmun reaffirmed the standard for trial closures which he first advanced in *Gannett Co. v. DePasquale,* 443 U.S. 368, 440 (1979) (Blackmun, J., dissenting), i.e., that closure is permissible only when "strictly and inescapably necessary." *Richmond Newspapers, supra,* 448 U.S. at 601, 604 (Blackmun, J., concurring).

Just two years after its watershed decision in *Richmond Newspapers,* this Court held unconstitutional a *mandatory* closure statute, like the ones at issue here. In *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 607 (1982), this Court held that the state interest in "safeguarding the physical and psychological well-being of a minor" does not justify a mandatory court closure rule. The statute in *Globe Newspaper* ordered courtrooms closed during the testimony of minor victims of sexual offenses. The majority opinion is further evidence of the broad purpose served by open proceedings and the scope of the constitutionally-required presumption of openness:

> Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . .' By offering such protection, the First Amendment serves to ensure that the individual

> citizen can effectively participate in and contribute to our republican system of self-government . . . . Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one.

Id., 457 U.S. at 604-605 [citations omitted].

Globe Newspaper also stands for the proposition that *mandatory* closure rules, without regard to the circumstances of the particular case, are constitutionally infirm. While finding that Massachusetts' interest in the well-being of minors was indeed compelling, the Court struck down the mandatory closure statute. The Court noted that "it is clear that the circumstances of the particular case may affect the significance of the interest," and held that the First Amendment required determinations regarding closure to be made on a "case-by-case" basis. *Id.*, 457 U.S. at 608.

Subsequent decisions of this Court have confirmed that the reasoning of *Richmond Newspapers* and *Globe Newspaper* applies well beyond criminal trials, and that only particularized findings regarding the need for closure will pass muster under the First Amendment. This Court has held that voir dire proceedings and preliminary hearings are presumptively open to the press and public under the First Amendment, and that they may not be closed except upon the entry of "findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press Enterprise I, supra,* 464 U.S. at 510, and *Press Enterprise II, supra,* 478 U.S. at 13-14.

In determining whether a qualified First Amendment right of access attaches to a particular proceeding, this Court's decisions have emphasized two complementary considerations: "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II, supra,* 478 U.S. at 8. These tests of experience and logic point to a qualified First Amendment right of public access to juvenile court proceedings in which juveniles are charged with law violations, especially when, as in this case, those proceedings involve legal arguments on the constitutionality of a state statute.

At the common law, allegations of crimes against juveniles were adjudicated in the same courtrooms in which adult criminal cases were tried. As one commentator has written,

> Our common criminal law did not differentiate between the adult and the minor who had reached the age of criminal responsibility, seven at common law and in some of our states, ten in others, with a chance of escape up to twelve, if lacking in mental and moral maturity. The majesty and dignity of the state demanded vindication for infractions from both alike.... The child was arrested, put into prison, indicted by the grand jury, tried by a petit jury, under all the forms and technicalities of our criminal law, with the aim of ascertaining whether it had done the specific act—nothing else—and if it had, then of visiting the punishment of the state upon it.

Mack, *The Juvenile Court,* 23 Harv. L. Rev. 104, 106 (1909). This Court has previously recognized the "uniform rule of openness" applicable to criminal proceedings at the common law. *Globe Newspaper, supra,* 457 U.S. at 605.

The uniform practice of trying and sentencing juveniles in open, public proceedings apparently continued until 1899, when the State of Illinois created the first state-created juvenile court, and mandated that its records and hearings be closed. Note, *The Public Right of Access to Juvenile Delinquency Hearings,* 81 Mich. L. Rev. 1540, 1547, n. 36 (1983). Proceedings against juveniles were open to the press and general public in Kentucky until 1906. Chapter 64, *Laws of Kentucky* (1906).

Even in the twentieth century, juvenile proceedings have remained open in many jurisdictions. A 1939 study of juvenile court law found that the public was excluded from juvenile proceedings in only 7 states and could be excluded in only 24 more. Jonas, *Press Access to the Juvenile Courtroom: Juvenile Anonymity and the First Amendment,* 17 Colum. J.L. & Soc. Probs. 287, 294-95 (1982). The present situation is still a patchwork. *Id.* Disclosure of court records is discretionary with the judge in most jurisdictions. *In re Gault,* 387 U.S. 1, 24 (1967). In some states, juvenile proceedings are presumptively open, pursuant to state constitutions or statutes. *See, e.g., State ex rel. Oregonian Publishing Company v. Deiz,* 289 Or. 277, 613 P.2d 23 (1980); Fla. Stat. §39.09(1)(c) (1988). Despite the presumptive closure of juvenile proceedings in

other jurisdictions in the twentieth century, it is clear that juveniles charged with law violations were tried in open courts when the First Amendment was adopted and ratified, just as "the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." *Richmond Newspapers, supra,* 448 U.S. at 569 (plurality opinion).

The second consideration in determining whether a presumptive right of access exists under the First Amendment is whether public access to juvenile proceedings "plays a significant positive role in the actual functioning of the process." *Press Enterprise II, supra,* 478 U.S. at 11. This Court has recognized numerous benefits accruing from public access to judicial proceedings. Access helps to insure the basic fairness of the proceeding, encouraging all participants to perform their duties conscientiously and discouraging misconduct and abuse of power by judges, prosecutors, and other participants. *Richmond Newspapers, supra,* 448 U.S. at 569 (plurality opinion); *Id.,* 448 U.S. at 596 (Brennan, J., concurring). The importance of public access is particularly important in situations like juvenile court, where no jury is present, because the jury has been "long recognized as 'an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge'." *Press Enterprise II, supra,* 478 U.S. at 12-13, *quoting, Duncan v. Louisiana,* 391 U.S. 145, 156 (1968). Additionally, open proceedings assure ac-

curate fact-finding, by discouraging witnesses from committing perjury and by inducing unknown witnesses to come forward and testify. *Richmond Newspapers, supra,* 448 U.S. at 570, n.8 (plurality opinion).

The same benefits which serve as the foundation for this Court's recognition of a constitutional right of access to criminal trials and pretrial proceedings apply with equal force to juvenile court proceedings involving law violations. Indeed, the increased assurances that an open proceeding will be fair and that fact-finding in such a proceeding will be accurate would appear to be particularly important in juvenile proceedings. As this Court noted in *Kent v. United States,* 383 U.S. 541 (1966), there are indications that juvenile court proceedings are often unfair to the juvenile.

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, as least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

Id., 383 U.S. at 555-556 (footnotes omitted).

Criticism of juvenile courts has not subsided in the 24 years since *Kent* was decided. In 1971, the Supreme Court of Alaska noted the extensive and fundamental error often found in appealed juvenile cases and openly wondered "whether secrecy is not fostering a judicial attitude of casualness toward the law in children's proceedings." *R.L.R. v. State of Alaska,* 487 P.2d 27, 38 (1971). Experts in the field of juvenile justice have recently concluded that juvenile courts should be open, so the press and the general public "may scrutinize what really goes on in juvenile court." I. Schwartz, *(In) Justice for Juveniles: Rethinking the Best Interest of the Child* 161 (1989). Professor Ira Schwartz, former director of the United States Office of Juvenile Justice and Delinquency Prevention, recently wrote:

> [D]elinquency proceedings should be open to the public and the media. Delinquency proceedings are conducted behind closed doors. This is done, presumably, to maintain confidentiality and to protect juveniles from being stigmatized and labeled by the community. In reality, these private proceedings have done little more than keep the public and the media from being able to monitor and scrutinize what really goes on in juvenile court. In 1986, the Minnesota legislature opened up delinquency hearings for 16- and 17-year olds accused of committing felonies. The opponents of this reform measure predicted that it would have dire consequences for the youth involved. To date, there is no evidence that this change in the law has had any significant adverse impact.

Id. See also, D. Richart and S. Bing, *Fairness is a Kid's Game: Children, Public Policy and Child Advocacy in the United States* 59 (1989) (stating that confidentiality is often used to protect agencies and schools, not the child).

As this Court has recognized, public access also serves to educate the public about the criminal justice process, *Richmond Newspapers, supra,* 448 U.S. at 572-73 (plurality opinion), which is essential to informed citizen debate and decision-making about issues with significant effects beyond the outcome of the particular proceeding. In Kentucky, where juvenile court judges and prosecutors are elected, "[a]ccess to juvenile court hearings would permit the public to evaluate the judge's [and prosecutor's] performance, thus enabling citizens to cast their votes intelligently." Note, *supra,* 81 Mich. L. Rev. at 1550. Public access also fosters an appearance of fairness, thereby heightening public respect for the judicial process. *Globe Newspaper, supra,* 457 U.S. at 606.

Open proceedings also provide a community therapeutic function by allowing the public to see that justice is done. *Richmond Newspapers, supra,* 448 U.S. at 570-572 (plurality opinion).

> When a shocking crime occurs, a community reaction of outrage and public protest often follows . . . . Thereafter, the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are

> frustrated and may manifest themselves in some form of vengeful 'self-help' as indeed they did regularly in the activities of vigilante 'committees' on our frontiers.

Richmond Newspapers v. Virginia, supra, 448 U.S. at 571 [citation omitted]. The therapeutic value of openness is no less important in the case of individuals under the age of 18, who accounted for 20% of all violent crime arrests, 44% of all serious property crime arrests and 39% of overall serious crime arrests in 1979. Note, *supra,* 81 Mich. L. Rev. at 1549-1550, n. 55. In a case involving a "juvenile charged with a heinous crime, the rationale for maintaining open proceedings applies with equal force to any other serious criminal matter." *Orange County Publications v. Dallow,* 14 Med. L. Rptr. 1311, 1314 (N.Y. Sup. Ct. 1987).

The reasoning of this Court in support of a right of access to criminal trials and pretrial proceedings applies to juvenile proceedings in which minors are charged with law violation. Despite the peculiar terminology used in juvenile court, "the reality of ... the Juvenile Court process" is that it may lead a boy charged with misconduct to be "committed to an institution where he may be restrained of liberty for years." *In re Gault, supra,* 387 U.S. at 27. The need for openness in that process, like the need which this Court found in *In re Gault* for procedures which afford due process, is no different than in criminal trials and pretrial proceedings for adults.

Certainly, no feature of juvenile court requires the closure of proceedings which involve the constitution-

ality of a statute and no facts about the juvenile or the offense with which he is charged. The Kentucky Court of Appeals decision closing such proceedings, without any finding that some overriding consideration requires closure or any consideration of alternatives to closure, is in conflict with the prior decisions of this Court.

Since this Court's decision in *Richmond Newspaper,* numerous courts have concluded that the same presumption of openness which attaches to criminal trials and pretrial proceedings also applies to proceedings in juvenile court. In *Associated Press v. Bradshaw,* 410 N.W.2d 577 (S.D. 1987), the South Dakota Supreme Court cited the First Amendment guarantees of free speech and free press, and held that those guarantees must be accommodated when juvenile court proceedings are closed. The South Dakota Supreme Court held that juvenile hearings could only be closed "on a case-by-case basis after consideration of all pertinent factors and all alternatives to closure." *Id.,* 410 N.W.2d at 579, *citing, Globe Newspaper, supra.*

> 'The First Amendment right of access cannot be overcome by the conclusory assertion that the publicity might deprive' the juvenile of his rights or protections . . . . Closure of juvenile proceedings should not occur unless specific supportive findings are made which demonstrate that closure is essential to preserve higher values and the order must be narrowly tailored to serve that interest.

Associated Press, supra, 410 N.W.2d at 580, *quoting, Press Enterprise II, supra,* 478 U.S. at 15.

Other courts have also held that First Amendment interests must be considered before juvenile hearings are closed. In *Taylor v. Indiana,* 438 N.E.2d 275 (Ind. 1982), *cert. denied,* 459 U.S. 1149 (1983), the Indiana Supreme Court noted that Indiana accommodates the competing interests of access and confidentiality by requiring that "care and discernment should mark the Court's approach to the balancing of interests, a matter which inherently requires a case-by-case analysis." *Id.,* 438 N.E.2d at 280.

The Supreme Court of Georgia, while declining to find a *presumption* of openness, has held that First Amendment interests must be considered before juvenile proceedings are closed, noting that a blanket rule that delinquency, deprivation and unruliness hearings *must* be closed would violate the First Amendment. *Florida Publishing Company v. Morgan,* 253 Ga. 467, 322 S.E.2d 233, 238 (Ga. 1984). The Court of Appeals of Ohio has also held that juvenile courtrooms cannot be closed until the court has "conducted an evidentiary hearing and made appropriate findings in accordance with First Amendment rights...." *Ohio ex rel Dispatch Printing Co. v. Petree,* 15 Med. L. Rptr. 2200 (Ohio App. 1988).[4]

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[4]Other courts have held that the constitutionality-required presumption of openness in judicial proceedings does not extend to actions involving juveniles. *See Matter of N.H.B.,* 769 P.2d 844 (Utah App. 1989); *Edward A Sherman Publishing Co. v. Goldberg,* 443 A.2d 1252 (R.I. 1982); and *In re J.S.,* 140 Vt. 458, 438 A.2d 1125 (1981). The presence of conflicting decisions of state courts of last resort is another reason why this Court should grant a writ of certiorari to review the decision of the Kentucky Court of Appeals. Supreme Court Rule 10.1(b).

In this case, the Kentucky Court of Appeals erred in failing to recognize or consider *any* First Amendment interest in open juvenile court proceedings, and in failing to require any findings that closure is essential to preserve higher values which cannot be accommodated under less drastic alternatives to closure. For that reason, this Court should grant a writ of certiorari to review the decision.

B. The Interests Identified By the Kentucky Courts are Insufficient to Require Closure of All Hearings and Records in Juvenile Court.

In the decision which the Kentucky Court of Appeals felt was dispositive in this case, the Kentucky Supreme Court held that "the shroud of secrecy and confidentiality [is] mandated by the above-cited statutes," and quickly dispensed with any argument that the First Amendment in any way limits the scope of the "shroud."

> Excluding the press from these proceedings does not violate or do violence to either the federal or the state constitution. F.T.P.'s right to a fair trial, and the public's interest in fostering opportunities for rehabilitation transcend the right of the press to an instantaneous reporting.

F.T.P. v. Courier-Journal, supra, 774 S.W.2d at 446 (Appendix at 13a).[5] The Court reached that decision without making *any* findings about F.T.P.'s particular case or considering *any* alternatives to closure. The

[5]The Court's statement that the right which the statutes deny to the press is "an *instantaneous* reporting" is baffling. Under the Kentucky Supreme Court's decision, juvenile court records and hearings are mandatorily and *perpetually* sealed.

result is a decision squarely in conflict with *Richmond Newspapers* and its progeny.

This Court's decisions make clear that the presumption of openness may be overcome only where closure is absolutely necessary to preserve higher interests.

> [T]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enterprise I, supra, 464 U.S. at 510. The interests cited by the Kentucky Supreme Court are insufficient to justify a mandatory closure statute.

Closure of judicial proceedings to ensure a fair trial, which the Kentucky Supreme Court stated was the purpose of the statutes, is nonsensical, in light of this Court's frequent pronouncements that *openness* helps to assure the basic fairness of judicial proceedings. *Richmond Newspapers, supra,* 448 U.S. at 569 (plurality opinion). Mandatory closure to protect the confidentiality of juvenile offenders, assertedly "fostering opportunities for rehabilitation", *F.T.P. v. Courier-Journal, supra,* 784 S.W.2d at 447 (Appendix at 13a), is also unjustified. As this Court recognized in *Davis v. Alaska,* 415 U.S. 308 (1974), "[t]he State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding" of a vital constitutional right. *Id.,* 415 U.S. at 320. In *Davis,*

this Court held that the interest in confidentiality must yield to a defendant's Sixth Amendment right to confront witnesses. In this case, the asserted interest in confidentiality must yield to the public's First Amendment right to observe judicial proceedings.

That result is particularly appropriate where, as here, no particularized findings were made regarding *any* alleged rights which would be damaged in any way by the release of the tapes or transcripts of the legal arguments on the constitutionality question. In fact, the juvenile court said nothing about the issue and the circuit court blindly applied what it construed as the *requirement* of Ky. Rev. Stat. 610.340(1) to deny access to the argument. In the decision relied upon by the Court of Appeals, the Kentucky Supreme Court cited "the shroud of secrecy and confidentiality *mandated* by the above-cited statutes. . . ." *F.T.P. v. Courier-Journal, supra,* 774 S.W.2d at 446 (emphasis added) (Appendix at 12a). A majority of the Court of Appeals felt that the Kentucky Supreme Court's decision was dispositive, if questionable. The result is a decision in which closure is mandated, without regard to the need for closure in a particular case, or available alternatives to it.

Globe Newspaper demonstrates that even compelling state interests simply cannot justify a *mandatory* closure rule, like the closure rule enunciated by the Kentucky courts.

> We agree with appellee that the first interest—safeguarding the physical and psychological well-being of a minor—is a compelling one. But as

> compelling as that interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interest of parents and relatives. Section 16A, in contrast, requires closure even if the victim does not seek the exclusion of the press and general public, and would not suffer injury by their presence.

Globe Newspaper, supra, 457 U.S. at 607-608 (emphasis in original) (footnotes omitted). This Court noted that "the names of the minor victims were already in the public record," indicating that closure might not be necessary. *Globe Newspaper, supra,* 457 U.S. at 608. In this case, of course, F.T.P.'s name and the offense with which he is charged are also widely known, as his counsel has admitted.

Any balancing of The Courier-Journal's rights with the alleged interest in the confidentiality of the proceedings in the instant action—balancing *required* by the First Amendment—would have necessarily resulted in a conclusion that the legal arguments on the constitutionality of the transfer statute must be made available to the press and the general public. The public's interest in arguments regarding the enforceability of statutes passed by its elected representatives is obviously strong. On the other hand, F.T.P.'s interest in closed proceedings after the wide dissemination

of his name and the nature of the offense with which he is charged is weak, especially in view of the fact that The Courier-Journal is seeking access to only the legal arguments concerning the constitutionality of the transfer statute and not the facts of F.T.P.'s case. Under those circumstances, the constitutional interest in open proceedings outweighs any conceivable interest in closing those legal arguments.

The Kentucky Court of Appeals decision precluded any consideration of the First Amendment issue, based on the Kentucky Supreme Court's holding that the statutorily-mandated closure "does not violate or do violence to either the federal or the state constitution." *Courier-Journal v. F.T.P., supra* (Appendix at 13a). That decision was wrong, for the same reason that this Court held Massachusetts' mandatory closure statute unconstitutional in *Globe Newspaper:*

> In short, §16A cannot be viewed as a narrowly tailored means of accommodating the State's asserted interest: That interest could be served just as well by requiring the trial court to determine whether the State's legitimate concern for the well-being of the minor victim necessitates closure. Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest.

Globe Newspaper, supra, 457 U.S. at 609. Because Ky. Rev. Stat. 610.070(3) and 610.340(1), as interpreted by the Kentucky courts, "cannot be viewed as a narrowly tailored means of accommodating the state's asserted interest," *Globe Newspaper, supra,* 457 U.S.

at 609, this Court should issue a writ of certiorari to review the decision of the Kentucky Court of Appeals.

CONCLUSION

This Court has previously determined that the First Amendment to the United States Constitution mandates a presumption of openness in criminal trials and pretrial proceedings. Kentucky has refused to follow that principle in cases in which individuals under the age of 18 are charged with acts which would constitute a crime if committed by an adult. In fact, Kentucky's courts have turned the presumption of openness on its head by holding that such proceedings are covered by a "shroud of secrecy and confidentiality *mandated* by" statute. *F.T.P. v. Courier-Journal, supra,* 774 S.W.2d at 446 (emphasis added) (Appendix at 12a).

There is simply no reason why proceedings which the Constitution would require be presumptively open if the accused was an 18-year-old can be mandatorily closed when the accused is 17. Just as "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court," *In re Gault, supra,* 387 U.S. at 28, the condition of being a boy does not justify an adjudication under a mandatory "shroud of secrecy and confidentiality." Because the decision of the Kentucky courts is in conflict with the First Amendment principles this Court has set forth regarding access to criminal proceedings, Petitioners, Courier-Journal and Louisville Times Company and Kay Stewart, respectfully urge this Court to grant this petition for a writ of certiorari to the Court of Appeals of Kentucky.

Respectfully submitted,

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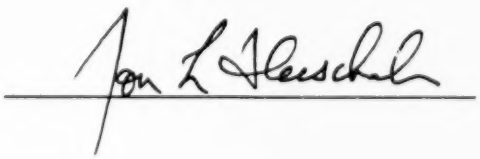
CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing have been served by mail, postage prepaid, upon J. David Niehaus, Deputy Appellate Defender of the Jefferson District Public Defender, 200 Civic Plaza, 179 West Jefferson Street, Louisville, Kentucky 40202, counsel for F.T.P.; and Greg Holmes, Office of the Attorney General, Capitol Building, Frankfort, Kentucky 40601, counsel for Honorable Robert E. Delahanty, this 14 day of July, 1990.



APPENDIX

RENDERED: OCTOBER 27, 1989; 10:00 A.M.
TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

88-CA-1489-MR

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY and
KAY STEWART - - - - - - - *Appellants*

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE REBECCA WESTERFIELD, JUDGE
ACTION NO. 88-CI-2609

F.T.P., the Real Party in Interest, and
HONORABLE ROBERT E. DELAHANTY, Jefferson
District Court Judge - - - - *Appellees*

AND

88-CA-1490-MR*

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY and
KAY STEWART - - - - - - *Cross-Appellants*

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE REBECCA WESTERFIELD, JUDGE
ACTION NO. 88-CI-2609

F.T.P., the Real Party in Interest, and
HONORABLE ROBERT E. DELAHANTY, Jefferson
District Court Judge - - - *Cross-Appellee*

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* F.T.P. filed an appeal against the Courier-Journal (88-CA-1422-MR). The Courier-Journal filed an appeal (88-CA-1489-MR) and a cross-appeal (88-CA-1490-MR). This Court granted F.T.P.'s motion to dismiss 88-CA-1422-MR and consolidated appeal number 88-CA-1489-MR and cross-appeal number 88-CA-1490-MR. The consolidated appeal is the matter before us here.

AFFIRMING

Before: HOWERTON, Chief Judge, HAYES and WEST, Judges.

HOWERTON, Chief Judge. The Courier-Journal and Louisville Times and Kay Stewart appeal from an order of the Jefferson Circuit Court denying their request for tapes or other information relating to oral arguments in the district court on the issue of the constitutionality of certain provisions of the juvenile code. The court reasoned that to order disclosure of the closed hearing "would require a declaration that KRS 610.340(1) is unconstitutional. . . ." The statute provides that "all juvenile court records . . . generated pursuant to KRS Chapters 600 to 645 . . . shall not be disclosed except to the child or parent unless ordered by the court for good cause. . . ." The circuit court avoided deciding the constitutional issue, but concluded that to make an exception permitting access to legal arguments in juvenile proceedings is simply unworkable.

The appellants raise the constitutional question before this Court in two ways. The first argument, which uses Sections 8, 11, and 14 of the Kentucky Constitution, is quite persuasive. Although we did not allow for its full development, if carried to its logical conclusion, the concept of any closed juvenile proceedings could be in jeopardy.

The second argument focuses more on the fact that juvenile proceedings are judicial and the statutes requiring closed hearings are legislative enactments. As such, the statutes violate Sections 27 and 28 of the Kentucky Constitution concerning the separation of powers.

Regardless of these arguments, the Kentucky Supreme Court finalized *F.T.P., an unnamed Child v. Courier-Journal,* Ky., 774 S.W.2d 444 (1989), on September 7, 1989. While our appeal considered the question of access to juvenile proceedings in the district or juvenile court, the Supreme Court case involved the question of access to records of juvenile proceedings on appeal to a circuit court.

Although our specific questions were not addressed by the Supreme Court decision, a majority on this panel nevertheless concludes that the Supreme Court's opinion is dispositive. It reads in part:

> Excluding the press from these proceedings does not violate or do violence to either the federal or the state constitution. F.T.P.'s right to a fair trial, and the public's interest in fostering opportunities for rehabilitation transcend the right of the press to an instantaneous reporting.
>
> . . . All judicial tribunals will remain closed to the press and the public unless and until F.T.P.'s status is changed.

774 S.W.2d at 446.

We would urge the Supreme Court to grant a petition for review, if one is requested in this case, and to consider the constitutional questions with the benefit of briefs and arguments. We also point the Supreme Court's attention to the reasoning in the dissent filed herein by Judge Hayes.

The order of the Jefferson Circuit Court is affirmed.

WEST, JUDGE, CONCURS; HAYES, JUDGE, DISSENTS BY SEPARATE OPINION.

HAYES, JUDGE, DISSENTING: There is no constitutional prohibition I am aware of that prohibits juveniles from being treated any differently than adults by the criminal justice system. In fact, it was not until the early 1900's, long after the adoption of the United States Constitution and the present Kentucky Constitution, that a separate system existed, by statute, for juveniles.

The Kentucky statute in question here is KRS 610.070(3). That statute was copied, with some minor changes which are not important here, from the Model Juvenile Court Act (U.L.A.) §24. By permitting the juvenile court judge to admit to these closed hearings "such persons as the judge shall find has a direct interest in the case or in the work of the Court," the Kentucky Legislature has left the door open for the press and the public to

enter. It is assumed the legislature was well aware of the official commentary to §24 of the Model Act when KRS 610.070(3) was enacted. That commentary states:

> The section as drawn permits the court in its discretion to admit news reporters. This is frequently done with the understanding that the identity of the cases observed will not be published, a procedure generally satisfactory to the news media.

Therefore, there is no law in Kentucky that requires mandatory closure of juvenile proceedings to the press and public as appellee argues KRS 610.070(3) does. However, that is not to say the judge is prohibited from closing the proceedings in a particular case. What is required of the court before he/she closes the proceedings?

The constitutional right of the press to access, that is its right to be present and gather the news, as opposed to the already determined unconstitutional prior restraint on the press, that is news already gathered and the desire to publish, is of recent origin. The United States Supreme Court in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), determined for the first time that the First and Fourteenth Amendments to the United States Constitution prohibited the denial of the press and public a right of access to adult criminal trials absent an overriding governmental interest articulated in specific findings by the trial court even though, as was the case in *Richmond,* the closure is by agreement of the defendant, prosecution and trial court.

The *Richmond* case was not a juvenile proceeding but was the fourth trial of an adult for murder. Research reveals no United States Supreme Court cases involving juvenile proceedings in the context of the right of access. However, *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 73 L.Ed.2d 248, 102 S.Ct. 2613 (1982), a right of access case, did involve a juvenile victim of rape as a witness in an adult criminal trial. The holding was that a state statute compelling exclusion of the press and public from the courtroom during the testimony of the juvenile

victim was unconstitutional. It is interesting to note the court stated that the compelling state interest, that of protecting the minor victim from further physical and psychological harm, as compelling as that interest is, did not justify a *mandatory* closure rule. The suggestion was, as it is here, that "the circumstances of the particular case may effect the significance of the interest." *Globe,* 73 L.Ed.2d at 248, 258. Therefore, the trial court should determine on a case-by-case basis whether closure is necessary.

I interpret *Globe* to stand for the proposition that *any* mandatory rule denying access of the press to the people's courtroom without particularity determinations in individual cases is constitutionally prohibited. Therefore, if as argued by the appellee, KRS 610.020(3) is a mandatory bar of access in all cases, I am prepared to say it is unconstitutional as violating the press's First Amendment right of access.

As stated above, however, I believe KRS 610.070(3) is not a mandatory closure rule. It is discretionary with the trial court whether to permit the press. But I believe it is clear from the above cases, even though not specifically involving juvenile offenders in a juvenile proceeding, that before a court can close the proceedings to the public and press there is to be some indication, articulated in a specific finding, that some discretion by the trial court has in fact been exercised. I perceive no greater governmental interest in protecting from publication a juvenile offender charged with rape, as KRS 610.070(3) appears to do absolutely, than the governmental interest in protecting a juvenile victim of a rape from the trauma of a public trial.

It would appear that, especially in cases where juveniles are charged with offenses that if committed by adults would be felonies, it would be in the best interest of the public and the juvenile justice system to open some of the juvenile court proceedings.

A Wisconsin court stated it clearly:

> One of the reasons why our courts are looked upon by the public with distrust and confusion is precisely because of the lack of public awareness of the court's day-to-day work. Very rarely is a juvenile case a matter of black and white. The press had a duty and a responsibility to report the shades of gray with which our courts must work. If the press is in the courtroom and does not unduly overstep its bounds by unnecessarily causing embarrassment to the children and their families, the press can see and hear the court's work. The results are twofold. First, there will be less misunderstanding of the difficult decisions juvenile court judges are called upon to make. *We believe that the legislature did not intend to exclude from the courtroom dedicated and fair journalists determined to relate difficult information in a way that makes this vital intelligence accessible to the general public.* Second, the public will be better informed on how the judicial power is being exercised in juvenile courts. As a result, on election day, the public will be better able to make an educated decision in electing the judiciary (Emphasis theirs). *State, ex rel. E.R. v. Flynn,* 276 N.W.2d 313, 318 (Wis. App. 1979).

The record does not indicate the exercise of any discretion by the juvenile court judge in determining the appellants were not entitled to access to the hearing requested by appellants, and absent a hearing where the appellant can be heard, this case must be reversed. However, I do not believe the holding could or should be confined to the narrow issue of whether the press should have been granted access to a hearing on a constitutional question, but absent a hearing and an overriding interest articulated in findings by the trial judge, all proceedings in juvenile court should be open.

Since the issue before us deals with the constitutionality of mandatory closure under KRS 610.070(3), the Kentucky Supreme Court case involving these same parties,

held to be dispositive by the majority, is not applicable as that particular issue was not before them.

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SUPREME COURT OF KENTUCKY

89-SC-874-D
(88-CA-1489-MR & 88-CA-1490-MR)

COURIER-JOURNAL & LOUISVILLE TIMES COMPANY, ET AL. - - - - - *Movants*

v.

Jefferson Circuit Court
88-CI-2609

F.T.P., THE REAL PARTY IN INTEREST, ET AL. - *Respondents*

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

The opinion of the Court of Appeals is ordered not to be published.

ENTERED April 18, 1990.

/s/ Robert F. Stephens
Chief Justice

RENDERED: JUNE 8, 1989
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

89-SC-103-MR

F.T.P., an Unnamed Child (Real Party in Interest) - - - - - - - - - *Appellant*

ON REVIEW FROM COURT OF APPEALS
v. **NO. 88-CA-2190-OA**
(JEFFERSON CIRCUIT COURT NO. 88XX0051)

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY,
KAY STEWART,
CARY WILLIS and
MARTIN E. JOHNSTONE, JUDGE, JEFFERSON CIRCUIT COURT - - - - - - - - - *Appellees*

AND

89-SC-126-MR

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY,
KAY STEWART and
CARY WILLIS - - - - - - - - - *Cross-Appellants*

ON REVIEW FROM COURT OF APPEALS
v. **NO. 88-CA-2190-OA**
(JEFFERSON CIRCUIT COURT NO. 88XX0051)

F.T.P. an Unnamed Child (Real Party in Interest), and
MARTIN E. JOHNSTONE, Judge, Jefferson Circuit Court - - - - - - - - - *Cross-Appellees*

OPINION OF THE COURT BY JUSTICE COMBS AFFIRMING IN PART/REVERSING IN PART

F.T.P., an unnamed juvenile, appeals from so much of an opinion and order of the Court of Appeals permitting appellees/cross-appellants to attend and report juvenile proceedings at the appellate level. Appellees/cross-appellants appeal from so much of the same opinion and order denying them access to his juvenile court records.

F.T.P. faces charges in the Juvenile Session, Jefferson County District Court. At the time of the alleged offense he was under the care, custody and control of the Cabinet for Human Resources. The present controversy arose when the Commonwealth sought to transfer the case to the Jefferson Circuit Court, for trial of F.T.P. as a youthful offender. This prompted the juvenile's attorney to challenge the constitutionality of the transfer statute, KRS 640.010. On January 22, 1988, the district court entered an order declaring the transfer statute unconstitutional due to vagueness because the statute failed to set forth appropriate standards for the making of a transfer determination.

After the Commonwealth appealed this order to Jefferson Circuit Court, Kay Stewart, one of the Courier's staff writers, requested access to the court file. Her request was denied because an order had previously been entered sealing the record. On April 21st the Courier filed motions to intervene and for access to the records. After a hearing Judge Martin E. Johnstone of the Jefferson Circuit Court entered an order permitting the intervention but denying access to the record.

On September 26th Cary Willis, another staff writer, was present at a hearing on the appeal in circuit court. At that time counsel for F.T.P. requested the court to close the proceeding to both the press and public. A hearing on this motion was held on September 30th before Judge Johnstone. On October 7th the court entered an order denying the Courier and its reporters access to the appeal hearings.

The court based its rulings upon provisions of KRS 610.070(3) and 610.340(1), which are as follows:

KRS 610.070(3)

> The general public shall be excluded and only the immediate families or guardians of the parties before the court, witnesses necessary for the prosecution and

> defense of the case, the probation worker with direct interest in the case, such persons admitted as the judge shall find have a direct interest in the case or in the work of the court, and such other persons as agreed to by the child and his attorney may be admitted to the hearing. Witnesses shall be admitted to the hearing only for the duration of their testimony.
>
> KRS 610.340(1)
>
> Unless a specific provision of KRS Chapters 600 to 645 specifies otherwise, all juvenile court records of any nature generated pursuant to KRS Chapters 600 to 645 by any agency or instrumentality, public or private, shall be deemed to be confidential and shall not be disclosed except to the child or parent unless ordered by the court for good cause.

It is the paper's contention that the first amendment to the United States Constitution, and Section 8 of Kentucky's Constitution as well as the common law rule gives it a right to be present at these hearings. The Courier did not challenge the constitutionality of the closure statutes, 610.070(3) and 610.340.

It was and is the Courier's contention that KRS 600.020(12) defines "court" to mean only the juvenile session of the district court, and that since the matter was on appeal to the Jefferson Circuit Court the statutes were inapplicable. In discussing this phase of the case we would like to point out that the opening words of KRS 600.020 make the definition conditional:

> As used in KRS Chapter 600 to 645, *unless* the context requires otherwise:
>
> . . . .
>
> (12) "Court" means the juvenile session of the district court, ... (emphasis added).

On October 10, 1988, the Courier filed an original action in the Court of Appeals seeking to prohibit Judge Johnstone from enforcing his order closing the proceedings concerning the juvenile.

On February 3, 1988, the Court of Appeals issued a Writ prohibiting Judge Johnstone from excluding the Courier from hearings in this case and from closing the circuit court record. The concluding paragraph of the opinion and order of the court is as follows:

> Therefore, the respondent is hereby prohibited from closing to the petitioners any hearings in the subject appeal now pending before him and from closing to them so much of the record on appeal even [sic] *as does not consist of the juvenile court record* (emphasis added).

The purpose of the shroud of secrecy and confidentiality mandated by the above cited statutes is to protect the juvenile. Clearly this purpose was uppermost in the minds of the General Assembly. It was intended that trials of juveniles not be publicized in the news media, as such publicity would possibly deprive the juvenile of a fair trial and, more particularly, would likely diminish his or her prospect for rehabilitation. To exclude the press at the district level, but admit them at the appellate level would tend to nullify the original intent and purpose of the legislature and the wholesome policy of the Uniform Juvenile Act.

F.T.P. is still a juvenile and still entitled to protection of the Act. The transfer hearing has not as yet been concluded. It may be that this case will ultimately be transferred to the circuit court for trial. If and when that occurs F.T.P. will then be stripped of the protection afforded by these statutes and will be treated as an adult, but until that happens we must comply with the law as written by our General Assembly and exclude the public

and press from all proceedings, both at the district and appellate levels.

Analyzing KRS 600.020(12) in the light of Section 115 of our constitution which guarantees to all citizens including all juveniles at least one appeal, and when considering it in the light of the above mentioned statutes, we conclude that the context requires a construction other than that made by the Court of Appeals and urged by the Courier.

Excluding the press from these proceedings does not violate or do violence to either the federal or the state constitution. F.T.P.'s right to a fair trial, and the public's interest in fostering opportunities for rehabilitation transcend the right of the press to an instantaneous reporting.

For the foregoing reasons, the action of the Court of Appeals is affirmed in part and reversed in part. All judicial tribunals will remain closed to the press and the public unless and until F.T.P.'s status is changed.

Stephens, C.J., Gant, Lambert, and Vance, JJ., concur.

Leibson, J., concurs in part, dissents in part by separate opinion in which Wintersheimer, J., joins.

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CONCURRING IN PART/DISSENTING IN PART BY JUSTICE LEIBSON

The constitutionality of the new juvenile transfer statute, KRS 640.010, is a matter of public importance, and the public and news media should have access to the appellate court proceedings regarding same except to the extent necessary to protect the juvenile as contemplated by KRS 610.070 and KRS 610.340. These confidentiality limitations should be understood in the context of KRS 600.020(12), which limits the term "court" as used in these statutes to the "juvenile session of district court."

Because this juvenile's case is still pending in the juvenile session of the district court, F.T.P. is entitled to the statutory protection in KRS 610.070 and KRS 610.340, but limited to the factual material pertaining to the juvenile in the record and evidence developed in Juvenile Court. To the extent this factual material is referred to or discussed in the circuit court appeal, confidentiality should be afforded. Beyond that point statutory confidentiality is not afforded, and should not be provided.

My interpretation of the decision of the Court of Appeals is that it is consistent with the position thus stated. Therefore, I would affirm the Court of Appeals.

Wintersheimer, J., joins.

Supreme Court, U.S.
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NO. 90-107

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

COURIER-JOURNAL and LOUISVILLE TIMES CO, et. al.

Petitioners

versus

F.T.P., REAL PARTY IN INTEREST and
HON. ROBERT DELAHANTY

Respondents

F.T.P.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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CERTIFICATE

I hereby certify that copies of this brief were deposited in the U.S. Mail, first-class postage prepaid, properly addressed to Mr. Jon Fleischaker and Mr. William Hollander, Wyatt, Tarrant & Combs, Citizens Plaza, Louisville, Kentucky 40202; and Mr. Greg Holmes, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601, on August 15, 1990.

J. DAVID NIEHAUS

TABLE OF CONTENTS

		PAGE
TABLE OF AUTHORITIES		ii-iii
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED		iv
ARGUMENT I:	**PETITIONERS DO NOT ESTABLISH A FIRST AMENDMENT CLAIM OF ACCESS TO JUVENILE COURT RECORDS. THEREFORE, PETITIONERS DO NOT PRESENT A QUESTION OF FEDERAL CONSTITUTIONAL LAW SUFFICIENT TO INVOKE THE JURISDICTION OF THIS COURT UNDER 28 U.S.C. § 1257.**	1-11
	(A) Establishment of First Amendment Right of Access.	2-4
	(B) Have Juvenile Court Proceedings Traditionally Been Open to the Public?	4-7
	(C) Would Public Access Play a Significant Positive Role in the Functioning of Juvenile Court Proceedings?	8-10
	(D) Proper Disposition of This Petition.	10-11
CONCLUSION		12

TABLE OF AUTHORITIES

CASES	PAGE
Application of Gault, 387 U.S. 1, 25 (1967)	5,9
Branzburg v. Hayes, 408 U.S. 665 (1972)	1,2
The Florida Star v. B.J.F., 491 U.S. ____, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989)	1.3
F.T.P. v. Courier-Journal, Ky., 774 S.W.2d 444 (1989)	7,10,11
Johnson v. Simpson, Ky., 433 S.W.2d 644, 647 (1968)	7
Kelly v. Robinson, 479 U.S. 36, 47 (1986)	5.8
Kent v. United States, 383 U.S. 541 (1966)	5
Press-Enterprise v. Superior Court, 478 U.S. 1 (1986)	1,3,4,6
Schall v. Martin, 467 U.S. 253, 263 (1984)	5,9
Spencer v. Texas, 385 U.S. 554 (1967)	8
Waller v. Georgia, 467 U.S. 39 (1984)	2

CONSTITUTIONAL PROVISIONS	
Article III, § 2, Constitution of the United States	ii,1
First Amendment, United States Constitution	passim
Sixth Amendment, United States Constitution	2

TABLE OF AUTHORITIES CONT.

STATUTES & RULES	PAGE
28 U.S.C. § 1257(a)	ii,2,11
Ky.Rev.Stat. Ch. 600 et seq.	2.6,4,11
Kentucky Acts, 1906 Regular Session, Chap. 64	4
Ky.Rev.Stat. 610.070(3)	4,8
Ky.Rev.Stat. 610.340(1)	4,8,10
Ky.Rev.Stat. 500.020(1)	6
Ky.Rev.Stat. 610.010(1)	6
Ky.Rev.Stat. 600.010	6
Ky.Rev.Stat. 600.010(2)(e)	6,8
Ky.Rev.Stat. 600.010(2)(a)	7
Ky.Rev.Stat. 600.010(2)(c)	7,8
Ky.Rev.Stat. 600.010(2)(d)	8
Ky.Rev.Stat. 610.330	8
Ky.Rev.Stat. 630.060(1)	8
Ky.Rev.Stat. 635.040	9
Ky.Rev.Stat. 610.070(2)	9
Ky.Rev.Stat. 610.060	9
Ky.S.Ct.R. 1.300(8)(a)	10

OTHER AUTHORITIES

Faust and Bingham, Juvenile Justice Philosophy, 2nd Ed., p. 101 (West, 1979)	6

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, Constitution of the United States

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; ***

28 U.S.C. § 1257(a)

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Portions of Kentucky's Unified Juvenile Code [Ky.Rev.Stat. Ch. 600 et seq.], cannot be set out conveniently at this point. Photocopies of the statutes cited to are found in the Appendix to this brief which follows immediately after the Conclusion.

SUMMARY OF ARGUMENT

Petitioners do not show the existence of a First Amendment right of access to hearings and records of the juvenile court proceedings authorized by the Kentucky Unified Juvenile Code of 1986. Because this is true, this Court does not have jurisdiction to grant relief. [28 U.S.C. § 1257(a)].

This Court has established a method of analysis that focuses on the particular circumstances of the proceedings or records to which access is sought. In The Florida Star v. B.J.F., 491 U.S. ____ (1989), the Court specifically held that it would not create expansive First Amendment rights of access. Rather, the Court held that the analysis would "sweep no more broadly" than necessary in the case under examination. When the Press-Enterprise II [Press-Enterprise v. Superior Court, 478 U.S. 1 (1986)], tests of historical tradition and beneficial effect of access is applied with the B.J.F. limiting principle in mind, it is plain that petitioners do not make out a valid First Amendment claim for access.

The Kentucky Unified Juvenile Code of 1986 is a comprehensive statutory revision and codification of all Kentucky laws pertaining to minors. One of the hallmarks of the new Code is confidentiality of proceedings and records. This concern with confidentiality is a continuation of Kentucky's public policy of exclusion of the general public which has existed from the enactment of Kentucky's first juvenile statute in 1906. The goal and the purpose of the Unified Juvenile Code are to strengthen families, to afford treatment and rehabilitation to juveniles who

break the law, and to assure that treatment does not take the child out of his family environment unless there is no alternative. The purpose of confidentiality has been and is to assist in the treatment and rehabilitation of the juvenile. Petitioners do not show specifically how access by the public and press would improve the function of the state district courts in their application of the Unified Juvenile Code. This Court has always hesitated to interfere with court systems of the states and has specifically encouraged states to create confidential juvenile court schemes. [Application of Gault, 381 U.S. 1, 25 (1967)]. Failure of petitioners to show how press access to juvenile records and proceedings would affect Kentucky's system positively, coupled with the failure to show a tradition of openness in juvenile courts, means that no First Amendment right of access exists. Thus, the court has no jurisdiction to grant relief.

Even if the court finds such a First Amendment right, under the present posture of the case, access should be denied. Kentucky has not yet decided whether F.T.P. should be transferred to circuit court for trial as an adult. Until Kentucky decides to do so, F.T.P. should have the benefits of the Unified Juvenile Code and the state should retain confidentiality to assist in rehabilitation and treatment of F.T.P. if he remains in the juvenile system. Thus, the petition should be denied.

ARGUMENT

PETITIONERS DO NOT ESTABLISH A FIRST AMENDMENT CLAIM OF ACCESS TO JUVENILE COURT RECORDS. THEREFORE, PETITIONERS DO NOT PRESENT A QUESTION OF FEDERAL CONSTITUTIONAL LAW SUFFICIENT TO INVOKE THE JURISDICTION OF THIS COURT UNDER 28 U.S.C. § 1257.

Petitioners start their argument by assuming that there is a First Amendment right of access to any court proceeding anywhere in the United States. In support of this position they cite a number of cases decided by this Court since 1980 that establish the right of the public and the press to attend adult criminal trials and proceedings ancillary thereto. (Petition for Writ, p. 10-14). However, petitioners overlook this Court's more recent decisions which describe a step-by-step, case-by-case approach to determination of the First Amendment right of access to court proceedings. Reference to this Court's decisions in Branzburg v. Hayes, 408 U.S. 665 (1972), Press-Enterprise v. Superior Court, 478 U.S. 1 (1986) and The Florida Star v. B.J.F., 491 U.S. ____, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) shows that this Court has never declared a blanket First Amendment right of access to court proceedings. Rather, as shown by these cases and others, the Court has examined carefully the circumstances of each situation presented to it, and has taken care not to establish a right of access greater than that necessary to insure protection of the rights of all parties in each situation. Under this approach, it is clear that petitioners have not established a First Amendment right of access in this case, and therefore, cannot invoke the jurisdiction of this Court. [Article III, Constitution of the

United States; 28 U.S.C. § 1257(a)]. In this response, F.T.P. will demonstrate that no right of access exists. Even if such a right is assumed, it is clear that the interests of F.T.P. and of the Commonwealth of Kentucky outweigh the interests of petitioners under a qualified First Amendment right of access at this stage of F.T.P.'s case. The Court will see that no useful purpose will be served in granting the writ in this case, and therefore the Court should deny the petition.

(A) Establishment of First Amendment Right of Access.

In Branzburg v. Hayes, 408 U.S. 665 (1972) the Court noted that news gathering qualifies for "some protection" but that "it is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. [408 U.S. at 681-682]. This rule obtains because, as the Court noted in Branzburg, "it has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." [408 U.S. at 684]. Therefore, the Court has taken a cautious approach toward establishing First Amendment rights of access to particular proceedings of the state courts. This approach was commented on first in Waller v. Georgia, 467 U.S. 39 (1984). Although Waller was a Sixth Amendment case, the Court had occasion to comment on its First Amendment jurisprudence. In Waller, the Court noted that in a number of cases the Court had "extended" the right to various aspects of adult criminal court

trials. [467 U.S. at 44-45]. The Court explained this approach more explicitly in The Florida Star v. B.J.F., 491 U.S. ____, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989). B.J.F. involved a prior restraint claim growing out of a tort suit for invasion of privacy. In response to a claim that truthful publication may never be punished, the Court stated that

> "our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily. *** We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case. [B.J.F., 491 U.S. at ____, 105 L.Ed.2d at 455].

Thus, the so-called Press-Enterprise II test, set out in Press-Enterprise v. Superior Court, 478 U.S. 1 (1986), is designed to determine the existence of a "qualified" First Amendment right of access based on the circumstances presented by the "instant case". That test has since become well known.

> "[I]n cases dealing with the claim of a First Amendment right of access to criminal proceedings, our decisions have emphasized two complementary considerations. ***
>
> . . . We have considered whether the place and process have historically been open to the press and general public ***
>
> Second, in this setting the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question. ***
>
> If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches. [478 U.S. at 8-9].

It is only after the moving party establishes the existence of the "qualified" First Amendment right that the state court or the opposing party must articulate the existence of a higher countervailing interest and tailor the closure order narrowly to serve only that interest. [478 U.S. at 9-10]. The facts of this case show that neither prong of the Press-Enterprise II test has been met by petitioners, and therefore, there is no First Amendment right of access to juvenile court proceedings or juvenile court records established by the laws of Kentucky.

(B) Have Juvenile Court Proceedings Traditionally Been Open to the Public?

Petitioners rely heavily on the fact that before the creation of juvenile courts, any person over the age of 7 could be convicted of a crime and subjected to adult criminal sanctions. (Petition, p. 15). On page 16 of the petition, petitioners correctly note that juvenile courts, as distinctive organs of government, came into existence only around the turn of this century. Kentucky first enacted a separate juvenile court statute in 1906. [Kentucky Acts, 1906 Regular Session, Chap. 64]. A separate juvenile court has existed in Kentucky since 1906, the most recent court being organized under the Unified Juvenile Code, Ky.Rev.Stat. Ch. 600 et seq. The hallmark of each new manifestation of the juvenile court statutes has been an emphasis on closure of proceedings and confidentiality of records. These two features are embodied in Ky.Rev.Stat. 610.070(3) and 610.340(1) of a current Unified Juvenile Code. This emphasis on

confidentiality was no doubt fostered by the decision in Application of Gault, 387 U.S. 1, 25 (1967) where the Court encouraged the states, consistent with due process, and if the state deemed it appropriate, "to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles." Kentucky has seen fit to maintain confidentiality in order to achieve the purposes of treatment and rehabilitation, which purposes will be discussed in the next section of this argument. At this point however, it is important to note that this Court has never voiced an objection to confidentiality of juvenile proceedings or records as long as the state has provided minimal due process protection for the child. This is because the state has a parens patriae interest in preserving and promoting the welfare of children. [Schall v. Martin, 467 U.S. 253, 263 (1984)]. A juvenile's "liberty interest" may in appropriate circumstances "be subordinated to the State's parens patriae interest in preserving and promoting the welfare of the child." Thus, in Schall, the Court upheld a New York state statute authorizing preventive detention of juveniles. Put simply, the Court has recognized and has encouraged special, and more lenient, treatment for juveniles. [Gault, cited above; Kent v. United States, 383 U.S. 541 (1966)]. As noted in Kelly v. Robinson, 479 U.S. 36, 47 (1986) "the right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States." Each state has an interest in "unfettered administration of [its] criminal justice system." [479 U.S. at 44]. By enacting a juvenile court statute, the General Assembly of

Kentucky has decriminalized behavior of persons under the age of 18. Obviously, if the common law could fix the age of criminal responsibility at seven years, a state legislature can, by positive enactment, decide that the age of criminal responsibility, (with certain exceptions) should be 18. [Mack, The Juvenile Court, 23 Harv. Law Rev., 104 (1909) reprinted in Faust and Bingham, Juvenile Justice Philosophy, 2nd Ed., p. 101 (West, 1979)]. In Kentucky, the common law of crimes has been abolished. [Ky.Rev.Stat. 500.020(1)]. The criminal law of Kentucky is entirely statutory. And, with few exceptions,

> ". . . the juvenile session of the district court of each county shall have exclusive jurisdiction in proceedings concerning any child living or found within the county who has not reached his 18th birthday or of any person who at the time of committing a public offense was under the age of eighteen (18) years . . .". [Ky.Rev.Stat. 610.010(1)].

The Unified Juvenile Code was enacted by the General Assembly of Kentucky to effectuate certain legislative purposes, chief among which are the treatment and rehabilitation of juveniles. [Ky.Rev.Stat. 600.010]. To protect the child, the General Assembly made all protections afforded under the Unified Juvenile Code those of the child. Unless otherwise specifically stated, these protections may not be waived by any other person. [Ky.Rev.Stat. 600.010(2)(e)]. It is therefore clear that the first prong of the Press-Enterprise test cannot be met. A juvenile proceeding under the Unified Juvenile Code of 1986 is not an adult criminal proceeding. The purpose of the Unified Juvenile Code is to strengthen and encourage family life "for the protection and

care of children", and to offer "all available resources to any family in need of them." Children may not be removed from their families "except when absolutely necessary" and only upon showing by the district court that "other less restrictive alternatives have been attempted or are not feasible . . .". [Ky.Rev.Stat. 600.010(2)(a); (c)]. To effect these purposes, Kentucky has always maintained a policy of confidentiality and closure of proceedings. [e.g., Johnson v. Simpson, Ky., 433 S.W.2d 644, 647 (1968); F.T.P. v. Courier-Journal, Ky., 774 S.W.2d 444 (1989)]. As noted in F.T.P. v. Courier-Journal,

> "The purpose of the shroud of secrecy and confidentiality mandated by the above cited statutes is to protect the juvenile. Clearly this purpose was uppermost in the minds of the General Assembly. It was intended that trials of juveniles not be publicized in the news media, as such publicity would possibly deprive the juvenile of a fair trial and, more particularly, would likely diminish his or her prospect for rehabilitation. To exclude the press at the district level, but admit them at the appellate level would tend to nullify the original intent and the purpose of the legislature and the wholesome policy of the Uniform Juvenile Act." [F.T.P. v. Courier-Journal, 774 S.W.2d at 446].

Petitioners can make no showing that juvenile court hearings traditionally have been open to the public. The cases petitioners cite on pages 16-17 and 23-24 of their petition simply show that there is a difference of opinion about the wisdom of confidentiality. Therefore, petitioners have failed to meet the first portion of the Press-Enterprise II test.

(C) **Would Public Access Play a Significant Positive Role in the Functioning of Juvenile Court Proceedings?**

In the preceding argument, F.T.P. mentioned the interest of the states in "unfettered administration of their criminal justice systems." [Kelly v. Robinson, 479 U.S. 36, 44 (1986)]. This Court has hesitated to interfere with state court proceedings except where the proceedings interfere with fundamental rights. [Spencer v. Texas, 385 U.S. 554 (1967)]. Respondent F.T.P. also has statutory rights arising out of the Unified Juvenile Code. [Ky.Rev.Stat. 600.010(2)(e)]. These rights include the right to treatment [Ky.Rev.Stat. 600.010(2)(d)]. F.T.P., under the Unified Juvenile Code, has the right if necessary, to a formal hearing from which the general public shall be excluded. [Ky.Rev.Stat. 610.070(3)]. He has the right to insist on confidentiality of court records [Ky.Rev.Stat. 610.340(1)] and to move for expungement after his course of treatment has been completed. [Ky.Rev.Stat. 610.330(1)]. Information supplied by a child to a court-designated worker before the filing of a petition is deemed confidential and cannot be disclosed without the written consent of the child. [Ky.Rev.Stat. 630.060(1)]. Upon adjudication, a child has the right to insist that a court first determine that all appropriate remedies have been considered and exhausted to assure that the least restrictive alternative method of treatment is utilized. [Ky.Rev.Stat. 600.010(2)(c)]. An adjudication by the juvenile court is not a conviction of crime, and does not impose any civil disabilities. Thus, under the Unified Juvenile Code, no child can be found guilty of a crime or be deemed a criminal by reason of an

adjudication under the Code. [Ky.Rev.Stat. 635.040]. Obviously, the Unified Juvenile Code is one that is directed primarily toward treatment of the juvenile offender. Although there are some provisions for formal adversary-type hearings [Ky.Rev.Stat. 610.070(2); 610.060], the Code is directed toward treatment. Adjudication serves merely as a predicate step to assure that the child is not subjected to discipline or treatment unfairly or unnecessarily. Against these interests, petitioners claim a "right to know" and cite some authorities to the effect that juvenile courts might do a better job if subjected to scrutiny. (Petition, p. 17-21). Petitioners do not deal with the specifics of the Unified Juvenile Code and offer no information about how well the district courts of Kentucky apply the provisions of the Code. F.T.P. agrees that this Court has more than once expressed unhappiness with the manner in which the practice in juvenile court diverges from the theory. [Application of Gault, 387 U.S. 1, 18-20 (1967)]. But, in the absence of specific evidence of wrongdoing or misapplication of juvenile statutes or infringement of the child's fundamental rights, this Court has not yet interfered with the operation of juvenile court systems in any state. [e.g., Schall v. Martin, 467 U.S. 253 (1984)]. In the absence of a more definite showing by petitioners of some particular evil, either in the operation of Kentucky courts under the Unified Juvenile Code, or of juvenile courts in general, petitioners cannot show a significant positive role in the functioning of the particular process. Therefore, petitioners fail to meet the second part of the Press-Enterprise test.

(D) Proper Disposition of This Petition.

In this petition, the Courier-Journal and its reporter seek access to juvenile court records. These records are confidential pursuant to Ky.Rev.Stat. 610.340(1). The record of the hearing on the issue of constitutionality of the previous transfer statute is necessarily confidential as well. The Court of Appeals of Kentucky was required to uphold these statutes because of the earlier decision by the Supreme Court of Kentucky in F.T.P. v. Courier-Journal, et al., Ky., 774 S.W.2d 444 (1989). In that opinion the Supreme Court of Kentucky noted that F.T.P. is still entitled to the protection of the Unified Juvenile Code. It may be that this case will ultimately be transferred to the circuit court for trial. If and when that occurs F.T.P. will then be stripped of the protection afforded by these statutes and will be treated as an adult, but until that happens the courts of Kentucky must comply with the law as written by the General Assembly and exclude the public and the press from all proceedings, both at the district and appellate level. [774 S.W.2d at 446]. Rule 1.300(8)(a) of the Rules of the Supreme Court of Kentucky required the Court of Appeals to follow the precedent established in the opinion of the Supreme Court of Kentucky. However, the exclusion of the public and the press is the right decision at this time. The transfer hearing still has not occurred. And in order to protect F.T.P.'s right to a fair trial, ". . . and the public's interest in fostering opportunities for rehabilitation" the press should be excluded from Juvenile Session proceedings at this time. Petitioners have failed to meet either prong of the Press-

Enterprise II test. That test is conjunctive, and failure to meet either means that petitioners have failed to establish a First Amendment right of access. Absent such a right, this Court has no jurisdiction to decide this case because there is no federal constitutional issue. [28 U.S.C. § 1257(a)]. Even if such a right is assumed to be shown, it is clear that the equities weigh in favor of exclusion at this point. F.T.P. has an interest in keeping his name out of the newspaper. The Unified Juvenile Code gives him that right and that expectation. The Commonwealth of Kentucky has the right to "foster opportunities for rehabilitation" and to conduct its justice system in the manner that seems best under the circumstances prevailing in Kentucky. Against these rights, petitioners posit some generalized notions that the press can help keep the court system honest. While this is true in a general sense, it is not a sufficient reason to strip F.T.P. of his confidentiality protections and to interfere with the state's attempt at rehabilitation. As noted in F.T.P. v. Courier-Journal, it may be that ultimately F.T.P. will be transferred to the circuit court for trial. At that point, he will be "stripped of the protection afforded by the statute and will be treated as an adult". [774 S.W.2d at 446]. But until that time, both F.T.P. and the state should be allowed to proceed under a well-thought out system in which petitioners have shown no flaw. Therefore, the Court is urged to deny the Petition for Writ of Certiorari.

CONCLUSION

For the reasons set out above, the Court is urged to deny the Petition for Writ of Certiorari filed on behalf of the Courier-Journal and Louisville Times and Kay Stewart.

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600.010 Title and intent of KRS Chapters 600 to 645

(1) KRS Chapters 600 to 645 shall be known as the Kentucky Unified Juvenile Code.

(2) KRS Chapters 600 to 645 shall be interpreted to effectuate the following express legislative purposes:

(a) The Commonwealth shall direct its efforts to the strengthening and encouragement of family life for the protection and care of children; to strengthen and maintain the biological family unit; and to offer all available resources to any family in need of them;

(b) It also shall be declared to be the policy of this Commonwealth that all efforts shall be directed toward providing each child a safe and nurturing home;

(c) The court shall show that other less restrictive alternatives have been attempted or are not feasible in order to insure that children are not removed from families except when absolutely necessary;

(d) Any child brought before the court under KRS Chapters 600 to 645 shall have a right to treatment reasonably calculated to bring about an improvement of his condition; and

(e) It shall further be the policy of this Commonwealth to provide judicial procedures in which rights and interests of all parties, including the parents, are recognized and all parties are assured prompt and fair hearings. Unless otherwise provided, such protections belong to the child individually and may not be waived by any other party.

HISTORY: 1986 c 423, § 1, eff. 7-1-87

610.010 District court jurisdiction of juvenile matters

(1) Unless otherwise exempted by KRS Chapters 600 to 645, the juvenile session of the district court of each county shall have exclusive jurisdiction in proceedings concerning any child living or found within the county who has not reached his eighteenth birthday or of any person who at the time of committing a public offense was under the age of eighteen (18) years, who allegedly:

(a) Has committed a public offense prior to his eighteenth birthday, except a moving motor vehicle offense involving a child sixteen (16) years of age or older. A child sixteen (16) years of age or older taken into custody upon the allegation that he has committed a moving motor vehicle offense shall be treated as an adult and shall have the same conditions of release applied to him as an adult. A child taken into custody upon the allegation that he has committed a moving motor vehicle offense who is not released under conditions of release applicable to adults shall be held, pending his appearance before the district court, in a secure juvenile detention facility or a juvenile holding facility or, if neither is available, in an intermittent holding facility. Children sixteen (16) years of age or older who are convicted of, or plead guilty to, a moving motor vehicle offense shall, if sentenced to a term of confinement, be placed in a secure juvenile detention facility or a juvenile holding facility. The term "moving motor vehicle offense" shall not be deemed to include the offense of stealing or converting a motor vehicle nor operating the same without the owner's consent, nor any offense which constitutes a felony;

(b) Has not subjected himself to the reasonable control of his parent or guardian, school personnel or other person exercising custodial control or supervision of the child;

(c) Is an habitual truant from school;

(d) Is an habitual runaway from his parent or other person exercising custodial control or supervision of the child;

(e) Is dependent, neglected, or abused; or

(f) Is mentally ill.

(2) Actions brought under subsection (1)(a) of this section shall be considered to be public offense actions.

(3) Actions brought under subsection (1)(b), (c), and (d) of this section shall be considered to be status offense actions.

(4) Actions brought under subsection (1)(e) of this section shall be considered to be dependency actions.

(5) Actions brought under subsection (1)(f) of this section shall be considered to be mental health actions.

(6) Nothing in this chapter shall deprive other courts of the jurisdiction to determine the custody or guardianship of children upon writs of habeas corpus, or to determine the custody or guardianship of children when such custody or guardianship is incidental to the determination of other causes pending in such other courts; nor shall anything in this chapter affect the jurisdiction of circuit courts over adoptions and proceedings for termination of parental rights. The court shall have no jurisdiction to make permanent awards of custody of a child, but if the court finds an emergency to exist affecting the welfare of a child, it may make temporary orders for his custody, however, if the case involves allegations of dependency, neglect or abuse, no emergency removal or temporary custody orders shall be effective unless the provisions of KRS Chapter 620 are followed. Such orders shall be entirely without prejudice to the proceedings for permanent custody of the child and shall remain in effect until modified or set aside by the court. Upon the entry of a temporary or final judgment in the circuit court awarding custody of such child, all prior orders of the juvenile session of the district court in conflict therewith shall be deemed cancelled. This section shall not work to deprive the circuit court of jurisdiction over cases filed in circuit court.

(7) The court of each county wherein a public offense, as defined in paragraph (a) of subsection (1) of this section, is committed by a child who is a resident of another county of this state, shall have concurrent jurisdiction over such child with the court of the county wherein the child resides, or the court of the county where the child is found. Whichever court first acquires jurisdiction of such child may proceed to final disposition of his case, or, in its discretion may make an order transferring the case to the court of the county of his residence, or the county wherein the offense was committed, as the case may be.

(8) In the event a child who has not reached his eighteenth birthday commits a new offense while under the jurisdiction of the court or during the period of commitment, the court shall have exclusive, original jurisdiction of the new offense.

(9) Nothing in this chapter shall prevent the district court from holding a child in contempt of court to enforce orders previously issued by the court.

(10) Nothing in this chapter shall confer upon the district court jurisdiction over the actions of the cabinet in the placement, care, or treatment of a child committed to the cabinet; or to require the cabinet to perform, or to refrain from performing, any specific act in the placement, care or treatment of any child committed to the cabinet, provided the district court shall have jurisdiction to review a dispositional order as provided in KRS Chapters 620, 630, 635 and 645 and to make orders pursuant to KRS 635.090.

(11) In addition to informal adjustment, the court shall have the discretion to amend the petition to reflect jurisdiction pursuant to the proper chapter of the Kentucky Unified Juvenile Code.

HISTORY: 1988 c 350, § 14, eff. 4-10-88
1986 c 423, § 20

Note: 610.010 contains provisions analogous to former 208.020, repealed by 1986 c 423, § 198, eff. 7-1-87.

610.060 Duty of court upon formal proceeding

If the court determines that a formal proceeding is required in the interest of the child or to determine the truth or falsity of the allegations against the child, a petition shall be required pursuant to KRS 610.020, and the court shall, when the child is brought before the court:

(1) Explain to the child and his parents, guardian, or person exercising custodial control their respective rights to counsel and, if the child and his parents, guardian, or person exercising custodial control are unable to obtain counsel, shall appoint counsel for the child and, unless specified to the contrary by other provisions of KRS Chapters 600 to 645, may appoint counsel for the parents, guardian, or person exercising custodial control;

(2) Explain the right against self-incrimination by saying that the child, parents, relative, guardian, or custodian may remain silent concerning the charges against the child, and that anything said may be used against the child;

(3) Unless limited by statute, explain the right to confront anyone who has accused the child and to cross-examine that person on the allegations made against the child;

(4) Advise the child and his parents, guardian, or person exercising custodial control of the right to appeal from a determination of the court;

(5) Advise the child that these rights belong to him and may not be waived by his parents, guardian, or person exercising custodial control;

(6) Unless otherwise exempted in KRS Chapters 600 to 645, a child and his parents or person exercising custodial control shall have a right to attend the hearing if such attendance will not unnecessarily delay the hearing; and

(7) The court may order a parent to pay for counsel for the child if the court determines that the parent has the ability to pay for such counsel.

HISTORY: 1988 c 350, § 18, eff. 4-10-88
1986 c 423, § 25

Note: 610.060 contains provisions analogous to former 208.060, repealed by 1986 c 423, § 198, eff. 7-1-87.

610.070 Hearings

(1) All cases involving children brought before the court shall be granted a speedy hearing and shall be dealt with by the court without a jury.

(2) The hearings shall be conducted in a formal manner, unless specified to the contrary by other provisions of KRS Chapters 600 to 645.

(3) The general public shall be excluded and only the immediate families or guardians of the parties before the court, witnesses necessary for the prosecution and defense of the case, the probation worker with direct interest in the case, such persons admitted as the judge shall find have a direct interest in the case or in the work of the court, and such other persons as agreed to by the child and his attorney may be admitted to the hearing. Witnesses shall be admitted to the hearing only for the duration of their testimony.

HISTORY: 1988 c 350, § 19, eff. 4-10-88
1986 c 423, § 26

Note: 610.070 contains provisions analogous to former 208.060, repealed by 1986 c 423, § 198, eff. 7-1-87.

610.330 Expungement of juvenile court records

(1) Any child who has been adjudicated as coming within the purview of KRS Chapters 630, 635, or 645, but not KRS Chapters 620 or 640, may petition the court for the expungement of his juvenile court record. He shall be informed of such right at the time of adjudication. The court on its own motion, or on the motion of a probation officer of the court, a representative of the cabinet or any other interested person, may initiate expungement proceedings concerning the record of any child who has been under the jurisdiction of the court. Such petition shall be filed or such court order entered no sooner than two (2) years after the date of termination of the court's jurisdiction over the person, or two (2) years after his unconditional release from commitment to the cabinet for human resources or a public or private agency, except that the two (2) year period may be waived if the court finds that such extraordinary circumstances exist with regard to the petitioner as to make the waiver advisable.

(2) Upon the filing of a petition or entering of a court order, the court shall set a date for a hearing and shall notify the county attorney and anyone else whom the court or the child, his parents, relatives, guardian, or custodian has reason to believe may have relevant information related to the expungement of the record.

(3) The court shall order sealed all records in the petitioner's case in the custody of the court and any such records in the custody of any other agency or official, including law enforcement records, if at the hearing the court finds that:

(a) Since the termination of the court's jurisdiction or his unconditional release from commitment to the cabinet or a public or private agency, the person whose record is in question has not been convicted of a felony, and has not been adjudicated under KRS 610.010(1)(a); and

(b) No proceeding concerning a felony and no petition under KRS 610.010(1)(a) is pending or being instituted against him.

(4) Upon the entry of an order to seal the records, the proceedings in the case shall be deemed never to have occurred and all index references shall be deleted and the person and court may properly reply that no record exists with respect to such person upon any inquiry in the matter.

(5) Copies of the order shall be sent to each agency or official named therein.

(6) Inspection of the records included in the order may thereafter be permitted by the court only upon petition by the person who is the subject of such records, and only to those persons named in such petition.

HISTORY: 1988 c 350, § 38, eff. 4-10-88
1986 c 423, § 52

Note: 610.330 contains provisions analogous to former 208.275, repealed by 1986 c 423, § 198, eff. 7-1-87.

610.340 Confidentiality of juvenile court records

(1) Unless a specific provision of KRS Chapters 600 to 645 specifies otherwise, all juvenile court records of any nature generated pursuant to KRS Chapters 600 to 645 by any agency or instrumentality, public or private, shall be deemed to be confidential and shall not be disclosed except to the child or parent unless ordered by the court for good cause.

(2) The provisions of this section shall not apply to public officers or employes engaged in the prosecution of cases under KRS Chapters 600 to 645 or other portions of the Kentucky Revised Statutes provided that the inspection of the records and the disclosure of the information contained therein is limited to that required in the investigation and the prosecution of the case.

(3) The provisions of this section shall not apply to employes of the cabinet or its designees responsible for any services under KRS Chapters 600 to 645 or to attorneys for parties involved in actions relating to KRS Chapters 600 to 645 or other prosecutions authorized by the Kentucky Revised Statutes provided that the inspection of the records and the disclosure of the information contained therein is limited to that required in the investigation and the representation of the client in the case.

(4) No person shall disclose any record or any information contained therein except as permitted by this section or other specific section of KRS Chapters 600 to 645, or except as permitted by specific order of the court.

(5) No person authorized to obtain records pursuant to KRS Chapters 600 to 645 shall obtain or attempt to obtain records to which he is not entitled or for purposes for which he is not permitted to obtain them pursuant to KRS Chapters 600 to 645.

(6) No person not authorized to obtain records pursuant to KRS Chapters 600 to 645 shall obtain or attempt to obtain records which are made confidential pursuant to KRS Chapters 600 to 645 except upon proper motion to a court of competent jurisdiction.

(7) No person shall destroy or attempt to destroy any record required to be kept pursuant to KRS Chapters 600 to 645 unless the destruction is permitted pursuant to KRS Chapters 600 to 645 and is authorized by the court upon proper motion and good cause for the destruction being shown.

(8) As used in this section the term "KRS Chapters 600 to 645," includes any regulations which are lawfully promulgated pursuant to KRS Chapters 600 to 645.

HISTORY: 1986 c 423, § 53, eff. 7-1-87

630.060 Information confidential

(1) Information supplied by the child to a court-designated worker during any process prior to the filing of the petition shall be deemed confidential and shall not be subject to subpoena or to disclosure without the written consent of the child.

(2) No complaint shall be received by the court-designated worker alleging habitual truancy unless an adequate assessment of the child has been performed pursuant to KRS 159.140(3), (4) and (6), unless it can be shown that the assessment could not be performed due to the child's failure to participate.

HISTORY: 1988 c 350, § 84, eff. 4-10-88
1986 c 423, § 114

635.040 Effect of adjudication by juvenile court

No adjudication by a juvenile session of district court shall be deemed a conviction, nor shall such adjudication operate to impose any of the civil disabilities ordinarily resulting from a criminal conviction, nor shall any child be found guilty or be deemed a criminal by reason of such adjudication.

HISTORY: 1986 c 423, § 127, eff. 7-1-87

Note: 635.040 contains provisions analogous to former 208.200, repealed by 1986 c 423, § 198, eff. 7-1-87.